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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NATALIE DOYLE, Plaintiff and Appellant, v. FORSTER RANCH ESTATES COMMUNITY ASSOCIATION, Defendant and Respondent.	G037161 (Super. Ct. No. 06CC02391) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed.

Law Office of Tracy Ettinghoff and Tracy Ettinghoff for Plaintiff and Appellant.

Kulik, Gottesman, Mouton & Siegel and Thomas M. Ware II for Defendant and Respondent.

* * *

Plaintiff Natalie Doyle (Natalie) appeals the trial court's order granting defendant Forster Ranch Estates Community Association's (Association) special motion to strike.[1] (Code Civ. Proc., § 425.16; all further statutory references are to this code.) Plaintiff's complaint for declaratory relief alleged the Association impliedly approved her home building plans by failing to review them within the time specified under the Association's governing documents. The trial court determined plaintiff's complaint arose out of petitioning activity under the anti-SLAPP statute because it was an attempt to circumvent a prior judgment against her father mandating removal of approximately 9,000 cubic yards of dirt for the property. Plaintiff contends the trial court erred by dismissing her case under the anti-SLAPP statute. She argues her complaint did not directly attack the prior judgment and therefore did not arise from it.

We conclude the present lawsuit seeks to overturn the injunction granted to the Association in the prior lawsuit. Forcing the Association to relitigate the injunction and other issues previously resolved in the earlier cases burdens the Association's right to petition protected by the anti-SLAPP statute. We further conclude plaintiff cannot demonstrate a probability of prevailing on the merits because her plans do not comply with the injunction and the Association timely disapproved them by its blanket refusal to review or approve any plans before compliance with the injunction. Accordingly, we affirm the trial court's order striking the complaint.

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[1] SLAPP is an acronym for strategic lawsuit against public participation, first coined by two University of Denver professors. (See Comment, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions* (1990-1991) 27 Cal. Western L.Rev. 399.)

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Association Lawsuit*

In February 2002, Michael and Christine Doyle, and a family trust in which the Doyles were trustees (collectively, Doyles), purchased a vacant residential lot in Forster Ranch Estates, a community of custom homes within a residential development commonly known as Forster Ranch. Before grading or construction may begin on a residential lot within the community, the permission of Forster Ranch Estates Community Association (Association) is required. (See *Forster Ranch v. Doyle et al.* (Sept. 30, 2005, G034081) [nonpub. opn.] p. 7 (*Forster Ranch*).)

In April 2002, the Doyles submitted an application to the Association's Architectural Control Committee (Architectural Committee) depicting proposed grading that would increase the lot elevation 16 feet to obtain a better ocean view. The Architectural Committee denied the application because it did not include building plans, but noted in its rejection: "'Because of the magnitude of pad elevation change, the rhythm of the terraced lots is disrupted. The original grading plan was designed to minimize the impact on ridgelines, open space, and view corridors while maintaining low density in the Estate area.'" (*Forster Ranch*, at p. 3.)

In August 2002, the Doyles submitted a new application to the Architectural Committee which included plans for a two-story 8,156 square foot home situated on the elevated pad depicted in the grading plans. The Architectural Committee again denied the application, noting: "'The architecture of your proposed home and the surrounding landscape are pleasing and consistent with the community. [¶] However, the site development plan is out of step with the site. It has been our practice to limit the height of any structure to a maximum envelope of 35 feet above the existing pad. This move, among other reasons, minimizes the massing of structures and leads to a more

open density pattern. Therefore your plan, as submitted, does not meet with our approval.'" (*Forster Ranch,* at p. 3.) The letter also noted: "'Balanced cut and fill or some export shows a plan that is working the structure into the lot, and not on top of a hill. As proposed, your plan would be considerably above the 35-foot envelope and would create a hill.'" (*Forster Ranch,* at p. 3.) The Architectural Committee denied the Doyles' appeal of their decision.

Despite the Architectural Committee's denial, the Doyles nonetheless commenced grading and filling their lot in preparation for construction. In response, the Association sued the Doyles and obtained a temporary restraining order (TRO) and preliminary injunction against the Doyles to prevent further grading and filling of the lot. The trial court conditioned the TRO and preliminary injunction, however, on the Association posting a $500,000 bond. Because the Association never posted the bond, neither the TRO nor the subsequent preliminary injunction became effective. The court informed the Doyles they were free to continue grading their land, but warned them a loss at trial could result in a permanent injunction requiring them to return their lot to its pre-grading condition. The court's warning proved prophetic, as the Association prevailed and obtained this relief. We affirmed the judgment in *Forster Ranch*. Before the permanent injunction became effective, the Doyles had moved approximately 9,000 cubic yards of dirt onto their lot.

B. *The Doyles Transfer the Property to Plaintiff*

Shortly before the trial court entered judgment in the Association action, the Doyles transferred title to the lot to plaintiff, Michael Doyle's daughter, without consideration. While the Doyles' appeal was pending, on September 21, 2004, Michael Doyle submitted a "Preliminary Design Concept" and application for the construction of a single story house on the lot at its current filled elevation. Although Michael Doyle already had transferred title to the lot to plaintiff, he failed to inform the Association of

this development and continued to represent himself as the owner. After further correspondence ensued between Michael Doyle and the Association, plaintiff's counsel sent a letter informing the Association its failure to respond to Michael Doyle's September 21 application resulted in the plans being deemed approved under article IX, section 7(c) of the development's declaration of covenants, conditions and restrictions (CC&R's).[2] The letter further stated: "Since the plans for a one story home are now deemed approved, the mandatory injunction is moot. [¶] Based on these facts, Mr. Doyle has the right to start construction of the one story home."

The Association flatly denied it failed to respond to the September 21 application, and stated: "Please understand that Mr. Doyle is *not* entitled to begin construction on his lot. Should he do so, the Association will take further legal action. The judgment is not mooted by any correspondence which Mr. Doyle might have sent to the Association, and the Association intends to enforce the judgment at such time as it is upheld by the Court of Appeal and remitted to the Superior Court."

Michael Doyle submitted additional architectural drawings for a proposed single story home on the filled lot in March 2005. On April 11, 2005, the Association notified Michael Doyle that it had just discovered the property had been transferred to plaintiff a year earlier, and requested her attendance at a scheduled mediation regarding the lot. In response, Michael Doyle stated he would attend the session, explaining: "I

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[2] Article IX, section 7(c) of the CC&R's provides, in relevant part: "The Architectural Control Committee shall take action on all plans and specifications within sixty (60) days after submittal thereof, in writing, to the Committee. In the event the Architectural Control Committee shall fail to act within said period by responding, in writing, the plans and specifications shall be deemed disapproved. If the Owner then notifies the Architectural Control Committee, in writing, within thirty (30) days following the expiration of said sixty (60) day approval period of the fact that the Owner has not yet received a written response to its submittal and still desires to continue with the proposed Improvement, and the Architectural Control Committee continues to fail to respond, in writing, for an additional thirty (30) day period following such notice, then the submittal shall be deemed approved."

can assure you that I am empowered and authorized to make any legal decision for [plaintiff] regarding the subject property. I do not believe it is necessary for her to attend this Mediation. If you have some good reason for requesting her to be there, let me know so that I may consider your request more diligently."

On April 18, 2005, the Association denied the plans Michael Doyle submitted in March 2005, in part, because they were not submitted by the record owner of the lot.

C. *The Present Lawsuit*

In May 2005, plaintiff submitted a new application to the Association for a single-story house placed at or near the current filled elevation of the lot, but would allegedly fit within 35 feet from the original grade. The Association's attorneys responded, informing plaintiff that neither the Association nor the Architectural Committee would accept or respond to any applications from plaintiff or her relatives until Doyle's appeals in the Association lawsuit became final, or they obeyed the injunction and returned the lot to its pre-grading condition. Plaintiff responded with another letter to the association, informing it that under article IX, section 7(c), of the development's CC&R's, a failure to respond to her application would be deemed an approval. The Association did not respond to plaintiff's last letter, and plaintiff filed the present action seeking a judicial declaration to deem her application approved by the Association's inaction.

The Association filed an anti-SLAPP motion, which the trial court granted. Plaintiff now appeals that order.

II

STANDARD OF REVIEW

A party may appeal an order granting a special motion to strike under sections 425.16, subdivision (i), and 904.1. We review a trial court's ruling on a motion to strike de novo, "conducting an independent review of the entire record." (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

III

DISCUSSION

A. Plaintiff's Complaint "Arises from" The Association's Reliance on the Permanent Injunction

Section 425.16 provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) An act in furtherance of the right of free speech includes "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).)

The anti-SLAPP statute arose from the Legislature's concern that plaintiffs were using the legal system not to succeed on the merits, but to chill the defendant's first amendment right of free speech. (*Liu v. Moore* (1999) 69 Cal.App.4th 745.) Thus, the statute notes: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional

rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly." (§ 425.16, subd. (a).)

To prevail on an anti-SLAPP motion, the movant must first make "'a threshold showing that the challenged cause of action' arises from an act in furtherance of the right of petition or free speech . . . ." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) If the movant meets this burden, the respondent must then demonstrate "'a probability of prevailing on the claim'"; if respondent cannot do so, the trial court must strike the cause of action. (*Ibid*.)

Filing a lawsuit is an exercise of the constitutional right to petition, and thus a protected act under section 425.16. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 (*Briggs*).) Accordingly, a cause of action arising from a defendant's previous filing of a lawsuit is subject to an anti-SLAPP motion. But it does not follow that a subsequent complaint necessarily "arises from" the earlier lawsuit. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77-78 (*Cotati*).)

For example, in *Cotati*, the city filed a state court action for declaratory relief regarding the constitutionality of a mobile home park rent stabilization ordinance in response to the park owner's federal court declaratory relief action challenging the same ordinance. The Supreme Court determined the state court action did not fall within the purview of the anti-SLAPP statute because the state court lawsuit arose from the dispute over the ordinance, and was not "based on" the prior federal action. The court rejected the notion that an action filed in response to a prior lawsuit automatically meant it arose

from the earlier case. (*Cotati, supra*, 29 Cal.4th at pp. 77-78.) The court explained: "[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.]" (*Id.* at p. 78, original italics.) Thus, as the court observed in a companion case discussing the same issue, "[t]he anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability. . . ." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92, original italics (*Navellier*).) In deciding whether plaintiff's declaratory relief action arose from the Association's earlier lawsuit, we consider "'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' [Citation.]" (*Cotati*, at p. 79.)

Plaintiff contends the Association's activity giving rise to its asserted liability is its failure to review her plans as required under the CC&R's. We disagree with this characterization.

The complaint does not allege the Association simply neglected to consider plaintiff's plans. Rather, the complaint alleges the Association "contend[ed] that it is not obligated to review plaintiff's plans for a home, or even respond to them, or make decisions based upon the aesthetics and other appropriate criteria, until plaintiff's father, MICHAEL DOYLE, complies with a court order ordering him to remove soil from the lot and requiring him to re-grade the lot back to its original grade." Thus, plaintiff's

complaint does not allege mere inaction, *but directly challenges the Association's reliance on the judgment obtained in its prior lawsuit*.

Significantly, plaintiff's new building plans do not call for bringing the lot back to its original grade in compliance with the permanent injunction, but leaves the pad at approximately the same elevation after her father placed the fill. The relief plaintiff requests in her complaint would eviscerate the injunction. In justifying her disregard of the prior judgment, plaintiff does not argue that taking title to the property from her father affected the enforceability of the injunction. Instead, plaintiff asserts the Association cannot rely on it because "the Association has allowed virtually every other owner in the community to add dirt to the original grade, and to build a house on a building pad which is higher than the original building pad as graded by the developer." Plaintiff further asserts "the Association's own Architectural Regulations contemplate and even encourage the regrading of lots and the Guidelines request that homes be designed to take up topographical fall in a lot using varying or split level designs. Designs are encouraged that terrace up or down the hillside to maximize ocean and other views." The complaint also notes the adjoining landowner objects to any home built on plaintiff's lot and has used his influence over the board of directors and Architectural Committee to block plaintiff's construction plans.

The Doyles, however, made these same allegations in the prior lawsuit. Specifically, the Doyles alleged the Association engaged in discriminatory treatment by allowing others to add fill to their lots, but disapproved similar plans from the Doyles. The Doyles also alleged the Association acted in bad faith and breached its fiduciary duties because of the neighboring landowner's influence over the board and Architectural

Committee. (See *Forster Ranch*, *supra*, at p. 13.) These issues were fully tried in the Association's prior lawsuit, and resolved adversely to the Doyles.

Plaintiff attempts to distinguish her situation from that of the Doyles in the previous suit by noting her new building plans are for a single story residence that fits within the required 35-foot building envelope. But the Association denied the Doyles' building plans not only for violating the 35-foot building envelope, but for the additional reason the grading plans would create a hill rather than working the house into the lot's existing topography. (See *Forster Ranch*, *supra*, at pp. 12-13.) More importantly, the Association specifically sought and obtained in the prior action an injunction requiring the Doyles to remove *all* fill and to bring the lot back to its original state. Any argument that the Doyles did not have to remove *all* of the fill either was or should have been litigated in the prior case. Under these circumstances, we conclude the present action represents the Doyles' attempt to collaterally attack the prior judgment, and transferring title to their daughter without consideration does not affect our analysis.

As we noted above, filing a lawsuit is an exercise of the constitutional right to petition, and thus a protected act under the anti-SLAPP statute. (*Briggs, supra,* 19 Cal.4th at p. 1115.) The anti-SLAPP statute, however, also protects conduct relating to such petitioning activity. (*A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1125.) Indeed, "[c]ourts have adopted a 'fairly expansive view' of litigation-related conduct to which section 425.16 applies." (*Ibid.*) Here, the Association's assertion of its rights under the injunction obtained in the prior action was "*in furtherance of* the exercise of the [Association's] constitutional right of petition . . . ." (§ 425.16, subd. (e)(4), italics added.)

That plaintiff's complaint relies on the terms of the CC&R's in seeking relief does not change the result. In *Navellier, supra*, 29 Cal.4th 82, the Supreme Court rejected the argument that an action based on contract cannot be subject to the anti-SLAPP statute. "The logical flaw in plaintiffs' argument is its false dichotomy between actions that target 'the formation or performance of contractual obligations' and those that target 'the exercise of the right of free speech.' [Citation.] A given action, or cause of action, may indeed target both. [C]onduct alleged to constitute breach of contract may also come within constitutionally protected speech or petitioning. The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability — and whether that activity constitutes protected speech or petitioning. Evidently, '[t]he Legislature recognized that "all kinds of claims could achieve the objective of a SLAPP suit — to interfere with and burden the defendant's exercise of his or her rights."' [Citation.] 'Considering the purpose of the [anti-SLAPP] provision, expressly stated, the nature or form of the action is not what is critical *but rather that it is against a person who has exercised certain rights*' [citation]." (*Id.* at pp. 92-93, second italics added.) Because the present action arises out of the Association's exercise of rights under the injunction issued in the prior action, it falls within the anti-SLAPP statute. Accordingly, we conclude the Association has met its burden of showing the plaintiff's present action arises out of an activity falling within the protection of the anti-SLAPP statute.

B. *Plaintiff Has Not Demonstrated a Probability of Success on the Merits*

Plaintiff contends she has met the second prong of the anti-SLAPP statute by demonstrating a probability of prevailing on her claim. We disagree.

As plaintiff notes, the CC&R's require the Architectural Committee to take action on all plans submitted to it within 60 days. If the committee fails to do so, the plans are deemed disapproved. The plans are deemed approved, however, if the homeowner later requests the Architectural Committee in writing to respond and the committee fails to do so. Plaintiff argues the evidence demonstrates the committee did not respond to her plans, either before the 60 days expired, or after her later written notice to the committee. Plaintiff contends this demonstrates a probability of prevailing on her claim.

Any perceived rights plaintiff may have under the CC&R's, however, is qualified by the previously entered judgment. Thus, the mandatory injunction requiring removal of all fill on the property supercedes any CC&R's provision otherwise requiring approval of plans affecting the same property. The evidence plaintiff presented demonstrates her plans did not call for the complete removal of the fill as required by the injunction. So long as the injunction remains in effect, plaintiff is not free to develop the property in a manner inconsistent with the court's directive.

Moreover, the Association, through its attorneys, provided plaintiff written notice it would not approve any plans for the property until its owner or owners complied with the injunction. Under these circumstances, the Architectural Committee's blanket refusal is sufficient to disapprove all plans pertaining to the property submitted by plaintiff and her family which do not conform to the injunction's requirements, even if the committee does not separately review and deny each set. Accordingly, we conclude plaintiff has failed to meet her burden of demonstrating a probability of prevailing on her claims.

In reaching this conclusion, we caution that nothing in our opinion should be read as authorizing the Association to simply ignore all future application requests from plaintiff, including those demonstrating compliance with the injunction. Plaintiff's declaration states that the city will not issue a grading permit for the removal of dirt from the lot without a development request (i.e., home plans). We would expect the Association to fully consider any plans plaintiff submits which, if approved, would facilitate compliance with the injunction.

IV

DISPOSITION

The trial court's order is affirmed. Respondent is entitled to its costs of this appeal.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.